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IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,

Petitioners,

—v.—

WILLIAM TWOMBLY, *ET AL.*, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Pharmaceutical Research and Manufacturers of America ("PhRMA") submits this brief as *amicus curiae* in support of petitioners.[1] All parties have consented to the filing of this *amicus curiae* brief pursuant to letters filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

PhRMA is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies.[2] PhRMA's members invent and market medicines that enable patients to lead longer, healthier and more productive lives. One of PhRMA's central functions is to represent the interests of its members before the courts, Congress and the Executive Branch. In that capacity, PhRMA regularly files *amicus curiae* briefs in cases that raise issues of vital concern to its members.

PhRMA submits this brief to urge this Court to grant the petition for a writ of certiorari because the pleading standard for antitrust conspiracies adopted by the Second Circuit in this case threatens to chill legitimate business conduct, and impose costs on PhRMA's members, which

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[1] Pursuant to Rule 37.6 of the Rules of this Court, PhRMA states that this brief was not written in whole or in part by counsel for a party, and that no one other than the *amicus curiae*, its members, or its counsel has made any monetary contributions to the preparation or submission of this brief.

[2] A current list of PhRMA's members is set forth on PhRMA's website, and can be found at http://www.phrma.org/about_phrma/member_company_list/members.

will harm American consumers and disserve the antitrust laws' substantive goals. The Second Circuit held that a court may not dismiss a claim under Section 1 of the Sherman Act even when the pleaded facts, and all natural or reasonable inferences drawn from those pleaded facts, would fail to evidence a Sherman Act conspiracy at summary judgment. Pet. App. 2a-34a. In so holding, the Second Circuit flouted Federal Rule of Civil Procedure 8 by creating a relaxed standard under which antitrust plaintiffs are not required to plead facts that, if proved, would entitle them to relief.

Applying that relaxed standard to this case, the Second Circuit held that allegations that petitioners engaged in parallel conduct, without more, suffice to allege a conspiracy under Section 1 of the Sherman Act even though such allegations, if proven, would fail to satisfy the applicable substantive legal standard governing Sherman Act conspiracy claims. Pet. App. 24a-25a. Essentially requiring petitioners, on a motion to dismiss, to prove a negative and address facts not pled in the complaint, the Second Circuit held that "a court would have to conclude that there is no set of [unpleaded] facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a. Or, as the court put it elsewhere, to sustain the conspiracy allegation, it need only conclude that "the pleaded factual predicate" included a "conspiracy among the realm of 'plausible' possibilities." Pet. App. 25a. Because a plaintiff can virtually always conjure up *un*pleaded facts (that is, facts that need not comply with the requirements of Federal Rule of Civil Procedure 11, or else they surely would have *been* pled) hypothesizing a "conspiracy among the realm of 'plausible' possibilities," *any* complaint challenging parallel conduct will survive a motion to dismiss in the Second Circuit. Pet. App. 28a.

The Second Circuit's pleading standard will encourage plaintiffs to initiate costly litigation that challenges nothing more than lawful and efficient conduct. As the Second Circuit itself recognized, evidence that companies engage in parallel conduct, without more, is insufficient to prove a Sherman Act conspiracy because parallel behavior may " 'simply be the result of similar decisions by competitors who have the same information and the same basic economic interests.' " Pet. App. 24a. Rather than a telltale sign of conspiracy, parallel conduct often reflects competition at work. This is particularly true of the pharmaceutical industry. PhRMA's members, many of which are based or operate in the Second Circuit, compete in an intellectual property-driven industry characterized by (i) pervasive federal regulation that applies uniformly to all members, (ii) gatekeepers (doctors and formulary designers) who determine whether and how prescription pharmaceutical products will be used, and (iii) increasingly sophisticated third-party payors who impose similar requirements on all competitors who wish to provide prescription pharmaceuticals to their beneficiary populations. Not surprisingly, as do participants in many other competitive markets, pharmaceutical companies often react similarly to the same regulatory and market forces.

For example, each PhRMA member provides the same type of information in the same format on the labeling accompanying its prescription medicines in light of regulations governing the content and format of such labeling. In addition, because many PhRMA members compete to convince the same doctors to write prescriptions for their medicines and because communications between PhRMA members and doctors also is subject to regulation, it is not surprising that PhRMA members often provide similar information in similar ways to doctors, even aside from the labeling itself.

Similarly, because the distribution of prescription pharmaceuticals is highly regulated, it is not surprising that many PhRMA members adopt similar practices and strategies to ensure that they sell through distribution networks that fully comply with U.S. Food and Drug Administration ("FDA") regulations, and ensure the pedigree and integrity of the products on pharmacists' shelves. Thus, faced with identical regulation and similar information about the distribution chain, many PhRMA members may make similar choices regarding whom to sell through, what terms and conditions to impose with respect to purchase volumes and returns to assure both availability and freshness, and other elements of the distribution relationship. Nor would it be surprising to find in any instance that several PhRMA members have adopted similar strategies to ensure that patients who are members of third-party payor plans (*e.g.*, health insurance plans, health maintenance organizations and other forms of managed care) have access to their medicines, in light of the fact that many such third-party payors rely on similar—and well known—strategies and tools in bargaining with PhRMA members over such things as formulary access.

Finally, all PhRMA members are cognizant of the same need to make their lifesaving products available to segments of the population who need them but cannot afford them, and it is not surprising that many have adopted similar strategies (sometimes through joint projects and sometimes acting individually) to make their products available to such populations for free or at greatly reduced prices. Because PhRMA members are generally not in the business of dealing directly with patients, they often must rely on, and negotiate with others—retail pharmacies, clinics, and other providers—to execute such programs. The search for efficient solutions

to similar problems, addressed through similar channels, will often yield similar approaches.

If left standing, the Second Circuit's newly-minted antitrust pleading standard threatens to subject PhRMA members to antitrust claims based on nothing more than allegations of such competitive, yet parallel, conduct that the antitrust laws do not prohibit. The ultimate dismissal of such baseless fishing expeditions on summary judgment, while likely, would provide cold comfort to defendants who will have been burdened with "the sometimes colossal expense of undergoing discovery, that . . . likely lead[s] defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims," which "encourages others to be brought." Pet. App. 30a. As the court of appeals itself recognized, the "overall result" of its dilution of Rule 8 "may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." Pet. App. 30a. Deterring PhRMA members from seeking the most efficient methods to address the regulatory and business realities they all confront could compromise the effectiveness of an indispensable American industry.

This Court should grant the petition for a writ of certiorari to make clear that, rather than compel this perverse result, the Federal Rules of Civil Procedure require an antitrust plaintiff to do what any plaintiff must do: Set forth in its complaint facts which, if taken as true and all inferences naturally arising from them drawn, substantively support each element of the claim asserted.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S RELAXED PLEADING STANDARD FOR SECTION 1 CONSPIRACY ALLEGATIONS FLOUTS RULE 8 AND THIS COURT'S PRECEDENTS

This "Court has never held that proof of parallel business behavior conclusively establishes agreement, or phrased differently, that such behavior itself constitutes a Sherman Act offense." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Indeed, even "conscious parallelism" is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). To protect lawful, parallel behavior from the chilling effect of costly mistaken inferences of conspiracy, this Court has held that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Rather, to infer a conspiracy under Section 1 of the Sherman Act, a plaintiff must prove facts " 'that tend[ ] to exclude the possibility' that the alleged conspirators acted independently." *Id.* (citation omitted). Thus, "[w]ith rare exceptions, the courts have been very clear that mere parallelism, including interdependent conscious parallelism, cannot support a conspiracy finding unless there are additional or 'plus' factors." 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1434(a), at 241 (2d ed. 2002). As this Court has explained, a contrary rule would "deter procompetitive conduct." *Matsushita*, 475 U.S. at 593; *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) (permitting an inference of conspiracy from conduct that is as consistent with legit-

imate competition as with conspiracy "could deter or penalize perfectly legitimate conduct").

The court of appeals erroneously held that the foregoing substantive legal test for conspiracy applies only at the summary judgment stage, and not at the pleading stage. Pet. App. 24a-28a. The substantive legal standard under Sherman Act Section 1 is the same at the pleading stage and at summary judgment. The only difference is that, at the pleading stage, the pled facts must be taken as true, while at summary judgment, triable evidence supporting those facts must be adduced. Thus, at the pleading stage, the facts pled must state a claim under the applicable substantive legal standard, *see* Fed. R. Civ. P. 8(a)(2); and at summary judgment, the plaintiff must adduce triable evidence of materials facts that meet that same substantive legal test. *See* Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."). There is no reason why a complaint should survive a motion to dismiss when triable evidence of the facts pleaded would be insufficient to defeat a motion for summary judgment.

To be sure, a complaint should be dismissed only where it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). That maxim of notice pleading does not, however, authorize a court "to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). The combined effect of these principles, the

district court in this case recognized, is that a conclusory allegation of a required legal element (here, conspiracy) that depends on the existence of unpleaded facts cannot alone meet the applicable substantive legal test. Rather, "[t]he crucial inquiry" is "what inferences naturally arise from the facts that plaintiffs have pled, taking all the facts in the Amended Complaint as true." Pet. App. 46a. To hold otherwise would effectively relieve a plaintiff of the obligation to plead facts that, if true, actually establish the substantive elements of its claim, in contravention of Rule 8's underlying principle of providing fair notice and commandment that "all pleadings shall be so construed to do substantial justice." *Conley*, 355 U.S. at 48.

This Court's decisions reflect this proper pleading standard at work. In *Associated General Contractors*, this Court held that the district court properly dismissed a Sherman Act claim when the plaintiff's allegations were "insufficient as a matter of law" to establish that the plaintiff was "a person injured by reason of a violation of the antitrust laws." *Associated Gen. Contractors*, 459 U.S. at 545-46.[3] The Court did not require defendants to show, as the Second Circuit did here, that there was "no set of [unpleaded] facts that would permit [the] plaintiff to demonstrate" antitrust injury. Pet App. 25a. Rather, the Court placed the burden of alleging facts establishing an essential element of its antitrust claim precisely where it belonged—on the party seeking to initiate litigation.

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[3] As a leading treatise, citing *Associated General Contractors*, states, "a complaint may be dismissed when it fails to allege some fact that is essential to the cause of action. . . . [F]ailure to allege a fact essential to the claim is tantamount to an admission that that fact cannot or will not be established." 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 307(c)(1), at 71 (2d ed. 2000).

This Court more recently reaffirmed the pleading principle underlying *Associated General Contractors* in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005), a securities case. Applying Federal Rule of Civil Procedure 8, the Court explained that plaintiffs' allegation that they " 'paid artificially inflated prices' " for the defendant issuer's securities was insufficient as a matter of law to establish proximate causation because that allegation, even if proven, "is not itself a relevant economic loss" and "the complaint nowhere provides the defendants with notice of what the relevant economic loss might be or what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.* at 1634. Significantly, in *Dura*, the Court did not speculate as to whether plaintiffs might establish "relevant economic loss" or its "causal connection" to the alleged wrongful conduct based on *un*pleaded facts, even though the Court acknowledged that "an initially inflated purchase price *might* mean a later loss." *Id.* at 1632 (emphasis in original).[4]

Thus, on a motion to dismiss, a complaint ought to be dismissed when the pleaded facts, and inferences that naturally arise from them, fail to meet the applicable substantive legal test. The Second Circuit's decision materially and improperly alters that standard by requir-

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[4] Similarly, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002), the Court sustained a complaint when the plaintiff "alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA" and his "complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." There the pleaded facts supported an inference that the plaintiff's termination was the result of his national origin. Here the pleaded facts, under settled antitrust law, cannot, without more, support an inference of conspiracy.

ing antitrust defendants at the pleading stage to refute the " 'plausible' possibilit[y]" of "facts" that plaintiffs themselves never asserted. Pet. App. 25a.

II. THE SECOND CIRCUIT'S FLAWED PLEADING STANDARD THREATENS TO DETER AND PENALIZE PRO-COMPETITIVE CONDUCT

A. The Pharmaceutical Industry is Particularly Vulnerable to the "Litigation Tax" that the Second Circuit's Reduced Pleading Standard Imposes

As this Court has recognized, absent the requirement of facts tending to exclude the possibility that alleged conspirators acted independently, antitrust conspiracy actions threaten to "deter or penalize perfectly legitimate conduct." *Monsanto*, 465 U.S. at 763; *see Matsushita*, 475 U.S. at 593.

There are compelling reasons to fear just such a chilling of legitimate conduct from the Second Circuit's flawed pleading test. "Mere parallelism . . . is widely present, especially in perfectly competitive markets, and is not itself a compelling subject for legal control." 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1417(g), at 115 (2d ed. 2002). Indeed, "it is important to recognize that similar simultaneous actions may merely reflect independent responses to a common business problem." *Id.* ¶1425, at 172. But under the Second Circuit's test, essentially *any* allegation of parallel conduct—conduct that is often the hallmark of "perfectly competitive markets"—mandates denial of a motion to dismiss and entitles the plaintiff to conduct a fishing expedition for other facts necessary to establish a Section 1 conspiracy. In other words, a *mere* entirely unsubstantiated *suspicion* of conspiracy provides a portal for initiating the costly process of discovery.

As this Court has recognized, the costs of baseless litigation are severe. Permitting allegations that do not meet Rule 8 "would permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.' " *Dura*, 125 S. Ct. at 1634 (citation omitted). Indeed, as the court of appeals conceded:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted.

Pet. App. 30a.

Importantly, as the court of appeals highlighted, the prospect of incurring costs in baseless discovery and agreeing to "*in terrorem*" settlements of meritless claims will likely inhibit firms from engaging in precisely the lawful, pro-competitive parallel behavior that the substantive law of antitrust conspiracy is designed to protect. Firms planning efficient responses to market forces that mimic rivals' actions could be deterred from taking these actions because of the prospect that such business strategies will draw a baseless—but extremely expensive—antitrust suit. If such a suit, moreover, erroneously

escapes termination at summary judgment or trial, the costs may prove catastrophic.[5]

The pharmaceutical industry is particularly vulnerable to the "litigation tax" and chilling effect that the Second Circuit's diluted pleading standard threatens to impose on pro-competitive conduct. In competing to sell their products, pharmaceutical manufacturers face the same market factors that affect their dealings with prescribers, patients, wholesalers, retailers, insurers, and other third-party payors who cover some or all of the costs of filling prescriptions on behalf of patients. For example, third-party payors have increasingly adopted similar and well known strategies—such as controlling access to prescription drugs through the use of tiered formularies and financial incentives or penalties that encourage or discourage the prescribing of certain products by doctors in their networks—to demand rebates from manufacturers on prescriptions obtained by plan beneficiaries. In addition, pharmaceutical manufacturers generally must sell their products through the same group of wholesalers in order to assure that their products will reach pharmacies throughout the country. Each such wholesaler ordinarily can be expected to provide the same type of information about its business operations to manufacturers to facilitate efficient distribution. Moreover, all manufacturers have the same access to third-party sources of information about competitor pricing (*e.g.*, publishers of pharmaceutical product and pricing information such as First Databank, MediSpan and Redbook) and retail sales

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[5] This Court has recognized the critical importance of taking into account the potential costs of "false positives" in designing antitrust legal tests. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004); *see also* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. __ (forthcoming Apr. 2006).

information (*e.g.*, IMS data regarding retail prescription sales). Thus, all manufacturers will generally find themselves making commercial decisions based on substantially similar information about the markets into which their products will be sold.

In addition, pharmaceutical companies all face identical and pervasive federal regulation governing all aspects of their operations and the chain of distribution from manufacturing facility to pharmacy counter. Thus, federal regulations govern applications for the approval to market new medicines, including requirements for the studies and testing that are necessary to support such applications,[6] as well as whether and how patent protection may be obtained for them.[7] Federal regulations also govern the manufacturing, processing, packing and storage of pharmaceuticals, including regulations regarding qualifications and training of employees engaged in such activities; the buildings and facilities used for such activities; the equipment used during such activities; requirements for production, process, packaging, labeling and laboratory controls; and record-keeping requirements.[8] In addition, manufacturers' distribution choices are affected by federal regulations.[9] Even the companies' commercial speech is highly regulated, as the FDA regulates the form and content of pharmaceutical companies' communications with doctors and the general public.[10] Finally, the rebates paid to States by manufac-

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[6] *See, e.g.*, 21 U.S.C. § 355 (2005); 21 C.F.R. §§ 312, 314 (2005).

[7] *See, e.g.*, 37 C.F.R. §§ 1.31, *et seq.* (2005).

[8] *See, e.g.*, 21 U.S.C. § 351 (2005); 21 C.F.R. § 211 (2005).

[9] *See, e.g.*, 21 C.F.R. § 203 (2005).

[10] *See, e.g.*, 21 U.S.C. §§ 321(m), 355(b)(1)(F), 355(e), 375(b) (2005); 21 C.F.R. §§ 200.5, 201, 202.1(j), 314.50 (2005).

turers with respect to prescriptions filled by certain patients who receive public assistance, such as those in the Medicaid program, are governed by federal regulation.[11] Such regulations apply to all innovator pharmaceutical companies in equal measure, and each must conform its conduct accordingly.

It is therefore hardly surprising—and not indicative of antitrust conspiracy—that pharmaceutical companies might react in similar fashion to the same market and regulatory realities. Moreover, the similar responses made by such companies to common business problems reflect efficient strategies for delivering benefits to consumers. The Second Circuit's new pleading standard for antitrust conspiracy cases, however, can be expected to deter the development and deployment of innovative business strategies that would have benefited consumers, or severely increase the costs of undertaking such efforts.

For example, as noted above, pharmaceutical manufacturing and distribution is highly regulated, and failure to meet government standards can have catastrophic consequences in terms of plant shutdowns, business interruption and loss of public confidence. If a number of companies relied on a supplier for certain ingredients (such as capsules), and the FDA identified a problem with one of the supplier's facilities, it would not be surprising if a number of companies suspended or terminated their dealings with that supplier in response—even though the problem was at only one location and the FDA did not order a shutdown—simply because they chose to be cautious. The Second Circuit's pleading standard, however, threatens to penalize pharmaceutical manufacturers that take actions they consider to be in the best long term interest of customers and shareholders.

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[11] *See, e.g.*, 42 U.S.C. §§ 1396r-8(b), (c) (2005).

Essentially, they risk paying a potentially massive "litigation tax" simply because they chose independently to take similar actions.

B. The Second Circuit's Flawed Pleading Standard Undesirably Encourages Meritless Suits by Promoting Forum Shopping and Circumventing the Limitations Congress Placed on Initiating Antitrust Investigations

The Second Circuit's new pleading rule also promotes undesirable forum shopping and ignores statutory limitations on investigations of suspected antitrust violations—limitations intended to protect the rights of investigated parties.

As Petitioners explain (Pet. App. 19-21), the Second Circuit's relaxed pleading test conflicts with decisions in several other federal courts of appeals. One can therefore predict that antitrust plaintiffs seeking to bring *in terrorem* conspiracy suits based on nothing other than allegations of parallel conduct will flock to the Second Circuit, even when those suits are more properly brought elsewhere. The consequence will be to further clog the dockets of courts recognized to be among "the busiest districts in the country," *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1128 (S.D.N.Y. 1992) (citation omitted), and to slow the resolution of legitimate disputes.

Finally, the Second Circuit's flawed pleading test effectively circumvents the careful limitations that Congress has placed on antitrust investigations. Congress vested the authority to investigate suspected antitrust violations not in private attorneys general, but rather in the Department of Justice and the Federal Trade Commission, *see* 15 U.S.C. §§ 57b-1, 1312 (2005) (conferring authority to issue civil investigative demands),

agencies authorized to represent the public interest, subject to important safeguards.[12] Yet the Second Circuit's pleading test permits private plaintiffs to launch a fishing expedition based on nothing more than a *mere suspicion* of illegality and without allegations of facts *necessary* to state a violation under the applicable substantive legal test for an antitrust conspiracy. Indeed, a plaintiff need not even have "reason to believe" (15 U.S.C. § 1312(a)) that a defendant's files will contain information that ultimately might substantiate its suspicion; rather, it must merely posit that the "conspiracy" it hypothesizes is "among the realm of 'plausible' possibilities." Pet. App. 25a.

The Second Circuit's pleading test, in other words, would transform private antitrust litigation from a method for resolving legitimate disputes into a virtually unrestrained private investigation tool. In the absence of a meaningful test imposed under Rules 8 and 12(b)(6), private plaintiffs, in effect, could issue civil investigative demands in the form of conclusory complaints and discovery requests any time parallel conduct is encountered without the important safeguards established by Congress that circumscribe government antitrust investigations. It is inconsistent with the investigative scheme Congress established to grant greater investigatory powers to private parties than are vested in the government agencies that are charged with protecting the public

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[12] For example, the Justice Department can issue a civil investigative demand only by written authorization of the Attorney General or a designate and a party subject to such a demand can promptly challenge the basis for its issuance or seek modifications. *See* 15 U.S.C. §§ 1312, 1314(b), 57b-1(f) (2005). State statutes place similar important limitations on pre-complaint discovery by state antitrust investigators. *See, e.g.*, Fla. Stat. Ann. § 542.28 (2005); Md. Comm. Law Code § 11-205 (2006); N.J. Stat. Ann. § 56:9-9 (2006); N.M. Stat. Ann. § 57-1-5 (2006); Tex. Bus. & Com. Code § 15.10 (2005).

interest while respecting the rights of investigated parties. Reading Rule 8 to authorize private antitrust investigations whenever parallel conduct is found will frustrate the will of Congress and impose on firms further unreasonable and detrimental burdens that harm, rather than benefit, consumers.

* * *

The relaxed pleading standard for antitrust conspiracy actions adopted by the Second Circuit deters and penalizes lawful conduct and thereby subverts the purposes of the antitrust laws. That deleterious outcome is contrary to Rule 8 and should not be countenanced at the pleading stage any more than at summary judgment.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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